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No. 90-900

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

—against—

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

Our petition pointed out that the instant case involves issues of national significance that are the subject of conflicting decisions in the lower courts. That fact — largely ignored by respondents — has been dramatically underscored by the concurrent filing of a petition for a writ of certiorari in *First*

Covenant Church of Seattle v. City of Seattle, 114 Wash.2d 392, 787 P.2d 1352 (1990), *petition for certiorari filed*, December 6, 1990, No. 90–892.

As indicated by the petition in *First Covenant*, the decision of the Supreme Court of Washington in that case is in direct conflict with the decision of the Second Circuit herein. The *First Covenant* petition also provides a further showing of the importance of the issues at stake in both cases. In this case we have emphasized the concerns of the religious community with the impact of landmark and historic preservation laws — an emphasis reinforced by the filing of *amicus curiae* briefs from a broad spectrum of religious organizations. At the same time, the petitioner in *First Covenant*, a municipality, has pointed out the interests of the many state and local governments across the country that have enacted historic preservation laws. Taken together, there can be little doubt that the "inconsistency and confusion over the constitutionality of applying [preservation] legislation to the large number of historical religious structures," *id.*, is a matter of serious national concern. The contemporaneous filing of petitions for certiorari in this case and in *First Covenant* provides this Court with a particularly fitting occasion to dispel the inconsistency and confusion.

ARGUMENT

Respondents' brief in opposition initially seeks — as it must — to defend the constitutional standard applied by the courts below: that no claim is stated under the First or Fifth Amendment absent a showing that petitioner "can no longer use [its] property." (Resp. Br. p. 14). Contrary to respondents' claim, however, no support for such a standard can be found in "this Court's settled First and Fifth Amendment jurisprudence."

The obvious defect in a standard of "continued use" is that it looks *solely* at what the church is left with and ignores what has been taken away from the church and what the church has been prevented from doing. Thus, it fails to measure either

the burdens that have been placed on the free exercise of religion or the value of the property that has been appropriated for governmental purposes. Recognizing the patent unfairness of such a standard, respondents also pursue an alternative course, *i.e.*, attempting to denigrate the magnitude of the burdens imposed and the value of the property taken. As shown below, however, that approach is equally unavailing.

I. THE LANDMARKS LAW IMPOSES SUBSTANTIAL BURDENS ON THE FREE EXERCISE OF RELIGION

A. The Burden Of The Landmarks Law On Religious Organizations Generally

In our petition, we showed in some detail how the vagueness of the criteria provided by the Landmarks Law, coupled with an almost total absence of due process in the procedures of the Landmarks Commission, together create a chilling effect on the free exercise of religion that is palpable and severe. (Pet. pp. 14–18).[1] In response, respondents are content to note in passing that the criteria under the law withstood a challenge in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Thus, respondents persist in the tactic, surprisingly successful in the courts below, of refusing to notice that *Penn Central* was not a First Amendment case. That tactic, however, should not be permitted to succeed in this Court. The availability of judicial review may have been, as respondents argue, some comfort in *Penn Central*, but it is no answer where the prior

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1. The inherent unfairness of the procedures of the Commission is further documented in the *amicus curiae* submission of the Church of St. Paul and St. Andrew. We respectfully urge the Court to consider whether any church or other religious organization, informed by the experiences of the Church of St. Paul and St. Andrew and of the petitioner herein, would even attempt to gain relief under the law against the opposition of the Landmarks Commission and the various preservationist groups with which the Commission enjoys a symbiotic relationship. (*See id.* at pp. 3, 15).

restraint of a First Amendment freedom is involved. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

B. The Burdens Of The Landmarks Law On St. Bartholomew's

1. The Burden On Religious Belief

Respondents quote approvingly an observation of the court of appeals that "no one seriously contends that the Landmarks Law interferes with substantive religious views." (Resp. Br. p. 9). On the contrary, however, we contend precisely that. It is the belief of the Rector, Wardens and Vestry of St. Bartholomew's that the dictates of their faith *require* the use of the Church's resources to support the religious mission of the Church. This theological imperative is set forth explicitly in the statement of Bishop Moore quoted in our petition. (Pet. pp. 19–20). The record contains similar testimony by the Rector, the Senior Warden and members of the parish. (A. 325–33, 355–63, 405). If still further theological support is required, it is readily available in the amicus curiae submissions filed in support of the petition.[2]

2. The Financial Burden

Our petition showed that the effect of the Landmarks Law was to destroy more than eighty percent of the value of the Church's principal asset. The Church has thereby been prevented from deploying that value, or any portion of it, in support of its mission. (Pet. p. 5). In response, it is argued here, as it was below, that free exercise rights are not impaired by the imposition of a financial burden under a "generally applicable" law, citing *Jimmy Swaggart Ministries & Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688 (1990); *Hernandez v. Commissioner*, ___ U.S. ___, 109 S.Ct. 2136 (1989); and

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2. See particularly the scriptural exegesis set forth in the submission of the Roman Catholic Archdiocese of New York *et al.* at pp. 5–9.

Employment Division v. Smith, ___ U.S. ___, 110 S.Ct. 1595 (1990).[3] That argument, however, cannot withstand analysis.

To begin with, even respondents recognize a limit to their argument in the cautionary language of *Swaggart* with respect to a financial burden that would "choke off" religious practices. Accordingly, respondents contend that protection against such an impact is found in the *Ethical Culture* test that purports to provide relief where the Landmarks Law "prevents or seriously interferes with carrying out the charitable purpose." *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925 (1980). (Resp. Br. pp. 19–20). That test, however, is fundamentally inadequate. As articulated by the New York Court of Appeals and applied by the Landmarks Commission, the test refers *only* to the condition of the landmarked building — and the need of a church to use a landmarked building to generate income for the support of its religious mission is considered to be wholly irrelevant. (See Pet. p. 20). As a result, the *Ethical Culture* test permits the Landmarks Law to impose financial burdens far beyond the modest tax consequences at issue in *Swaggart* and *Hernandez*. Indeed, it permits an impact on religious mission, *i.e.*, the choking off of religious practices, that is inescapable and severe.[4]

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3. Respondents also attempt to dispute the fact that eighty percent of the value has been destroyed. (Resp. Br. p. 13 n. 2). As shown below, the attempt amounts to little more than a quibble. (See *infra* p. 8).

4. Moreover, the basic inadequacy of the *Ethical Culture* test was seriously compounded by the courts below. By requiring petitioner to prove that it "can no longer carry out its charitable purposes," the courts below removed from the *Ethical Culture* test the concept of "serious interference." In this case, even if one were to conclude, as the court of appeals did, that the Church could somehow bear $4.5 million of repair and rehabilitation costs, it would have been difficult to believe that the diversion of such an amount from support of the Church's mission was not a "serious interference" with its charitable purpose. In the eyes of the courts below, however, such interference was immaterial.

Furthermore, as set forth in our petition, there is no principled basis on which the Landmarks Law can be considered "generally applicable" within the meaning of *Smith* or any prior case law. The singling out of individual buildings as landmarks is, for example, altogether unlike the effect of zoning or historic district laws that *are* generally applicable to buildings within a specified area. Nevertheless, in a curious *non sequitur*, respondents argue that:

> Petitioner's failure to challenge the designation in the many years since 1967 is telling evidence that the Landmarks Law is a neutral law of general applicability that may be validly applied to properties owned by religious organizations. (Resp. Br. p. 23).

In fact, the Church did not seek judicial review of the initial designation because it relied on assurances by the Commission that it would be prepared to accommodate the future needs of the Church.[5] Ultimately, of course, such assurances proved to be quite illusory.

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5. The initial designation contained the following language:

> By this designation of the Landmark and Landmark Site, it is not intended to freeze the structures in their present state or to prevent the alteration or expansion of existing structures or the erection of other structures to meet the Church's requirements in the future. The Commission believes it has the obligation and it has the desire to cooperate with the owners of Landmarks in such situations and looks forward to working with representatives of St. Bartholomew's Church should such contingencies occur. (A. 597).

The inclusion of such language resulted from negotiations following an objection to the designation by the Church in a letter dated April 26, 1966. The first application of the Church for a Certificate of Appropriateness relied explicitly upon the assurances in the designation. (A. 193–97).

C. The Burden Of Entanglement

It is clear that the Landmarks Law gives rise to an unprecedented degree of entanglement between church and state. The problems of entanglement have traditionally been analyzed in the context of the establishment clause, *e.g. Lemon v. Kurtzman,* 403 U.S. 602 (1971). In addition, we suggest that entanglement may also be considered as a discrete form of burden under the free exercise clause. Viewed in either context, however, the entanglement between the Landmarks Commission and owners of landmarked buildings is truly extraordinary.

Respondents attempt to conceal that fact by glibly characterizing the proceedings before the Commission as an inquiry into "objective architectural concerns" and "objective financial data." (Resp. Br. pp. 21–22). As shown in our petition, the inquiries of the Commission are in fact far broader and far more intrusive. (Pet. p. 21, n. 12).[6] Moreover, respondents ignore the fact that the judgments ultimately applied by the Commission are unmistakably subjective, *e.g.,* that it is acceptable for the Church to be forced to operate its breakfast feeding program from the Mortuary Chapel and to operate its pre–school from a fifth floor served by an unenclosed fire escape (A. 569–71; 450); that repairs to the Church's building should be done piece–meal, over several years, to avoid the need to comply with the current building code (A. 849–50); and that the Church's fund raising efforts should be concentrated on building repair and preservation. (A. 864–65). In short, the Commission's judgment, as applied to a variety of activities, was that, whenever and wherever necessary, support of the Church's religious mission must yield to support of the Church's landmarked building. That judgment, we submit, offends both the

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6. The nature of the inquiries made, and judgments applied, by the Commission are also illustrated in the *amicus curiae* submission of the Church of St. Paul and St. Andrew. The *amicus curiae* submission of the Council on Religious Freedom, at pp. 5–14, provides a cogent analysis of relevant case law under the establishment clause.

free exercise and the establishment clauses of the First Amendment.

II. THE VALUE OF THE PROPERTY APPROPRIATED

In addressing petitioner's claim under the taking clause, respondents attempt to cram the facts of this case into the mold of *Penn Central.* Unfortunately, they simply do not fit.

Thus, respondents attempt to argue that, as in *Penn Central,* petitioner's development rights have not been lost because here (a) the Commission might permit petitioner to build *something* above its Community House; and (b) the air rights above the Community House might *someday* be transferred elsewhere. (Resp. Br. pp. 26–27). Both prongs of respondents' argument are devoid of substance.

As pointed out in our petition, the only expansion the Commission has indicated it might approve is a two–story addition — an expansion that would alleviate *some* of the Church's space problems but would generate no revenue to repay the cost of its construction, much less provide support for the Church's mission.[7] Moreover, even if constructed, such an

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7. The court of appeals saw a two story addition as a partial solution to the inadequacy of the Church's existing space. Respondents misstate the record in asserting that

> The Courts below determined that petitioner could house all its desired activities in the Community House and, therefore, did not need to demolish the landmark structure. (Resp. Br. p. i).

On the contrary the court of appeals explicitly found that "the Community House currently is too small." (19a). This led the court, like the Landmarks Commission, to propose a two story addition, but neither the court nor the Landmarks Commission made *any* allowance for the cost of *any* expansion. The court also conceded that such an expansion "may not provide ideal facilities" and noted specific space needs that would not be met by the proposed addition. (*Id.*).

expansion would reflect a use of the Church's development rights that is essentially *de minimis*.

Similarly fanciful is the suggestion that any substantial value should be attributed to the Church's theoretical ability to transfer the air rights over the Community House. As pointed out in the petition, the Church — unlike *Penn Central* — owns no other properties to which such air rights could be transferred and has no prospects for such a transfer. (Pet. pp. 24–25). Speculation as to the possibility of some future value provides no basis whatever to conclude that the impact of the Landmarks Law has been significantly mitigated.

Respondents also argue that the legal standard adopted by the New York court provides adequate relief from the burdens of the Landmarks Laws. (Resp. Br. pp. 27–28). As we have shown, however, the *Ethical Culture* test focuses solely on the suitability of the landmarked building for existing uses and ignores the owner's right to develop its property. In that crucial respect, the *Ethical Culture* test is in conflict not only with *Penn Central* but with the more recent decision of the New York Court of Appeals in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, *cert. den. sub nom., Wilkerson v. Seawall Associates*, ___ U.S. ___, 110 S. Ct. 500 (1989).[8] Moreover, as we have shown, even the narrow scope of relief provided by the *Ethical Culture* test was further limited by the courts below. (See *supra* p. 5, n. 4).

In sum, it is abundantly clear that the instant case is very different from *Penn Central* in virtually every respect. Indeed,

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8. Respondents attempt to distinguish *Seawall* by means of a subtle misquotation: "In its opinion in *Seawall* the court of appeals cited *Penn Central* with approval and discussed at length the reasons why the law at issue was 'unlike that of the Landmarks Law in *Penn Central*.'" (Resp. Br. p. 29). In fact, however, the court in *Seawall* stated that *the effect of* the law at issue therein was unlike that of the Landmarks Law in *Penn Central*. So here, the effect of the Landmarks Law is quite unlike that in *Penn Central* — for the very reasons noted by the court in *Seawall*. *See id.*, 74 N.Y.2d at 108 n. 8, 542 N.E.2d 1066 n. 8.

the expansion of *Penn Central* by the courts below to deny relief under the facts of this case necessarily rejected fundamental values that had been recognized in *Penn Central* and reaffirmed in the subsequent decisions of this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: February 8, 1991

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